Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

HORIZON WEST, INC., *et al.*,
Petitioners,

v.

UNITED STATES *ex rel.* FOUNDATION AIDING THE ELDERLY AND MARSHA J. BAKER,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The False Claims Act permits certain so-called *qui tam* actions, but forbids jurisdiction over any action that is "based upon the public disclosure of allegations or transactions" in certain fora. 31 U.S.C. § 3730(e)(4)(A). This case raises the following question:

> Whether Section 3730(e)(4)(A)'s jurisdictional bar applies where a *qui tam* relator relies on publicly disclosed information concerning impropriety or wrongdoing on a defendant's part?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioners, defendants-appellees below, are Horizon West, Inc. and an extensive list of directly or indirectly wholly owned subsidiaries. More specifically, petitioners are the following: (a) Horizon West, Inc., which does not have a parent company; (b) Auburn Manor, Inc. (formerly dba Parkview Nursing Center), Emerald Distributing Company, Inc., Empress Convalescent Hospital, Inc., Far West, Inc., Horizon West Headquarters, Inc., Sierra Health Care Management Corporation dba Sierra Health Care Convalescent Hospital, Sierra Medical Enterprises, Inc., Sierra Solano Care Center, Inc., and Westcare Management, Inc., the parent company of each of which is Horizon West, Inc.; (c) El Dorado Convalescent Hospital, Inc., Foothill Oaks Care Center, Inc., Hilltop Manor Convalescent Hospital, Inc., Lakeport Skilled Nursing Center, Inc., Lincoln Manor, Inc., Live Oak Manor, Inc., Meadow View Manor, Inc., Monterey Pines Skilled Nursing Facility, Inc., Napa Nursing Center, Inc., Placerville Pines Convalescent Hospital, Inc., Roseville Convalescent Hospital, Inc., Sierra Hills Care Center, Inc., Sunny Hills Convalescent Hospital, Inc., Valley View Skilled Nursing Center, Inc., and Walnut Whitney Convalescent Hospital, Inc., the parent companies of each of which are Sierra Medical Enterprises, Inc. and Horizon West, Inc.; (d) Linwood Gardens Convalescent Hospital, Inc., Medicrest of California, Inc. dba Medical Center Convalescent Hospital, Medicrest of California 1, Inc. dba Arlington Gardens Convalescent Hospital and Montclair Manor Convalescent Hospital, Mid-Wilshire Convalescent Hospital, Inc., Sacramento Convalescent Hospital, Inc., South Gate Care Center, Inc. dba Casa del Rey Care Center, Vallejo Convalescent Hospital, Inc. dba Sereno Care Center, Westgate Gardens, Inc., and Whitehall Convalescent Hospital, Inc. dba Wellesley Manor Convalescent Hospital, the parent companies of each of which are Far West, Inc. and Horizon West, Inc.; (e) Four

Corners Regional Care Center, Inc., Parkdale Care Center, Inc., Red Cliffs Regional, Inc. dba Red Cliffs Convalescent and Rehabilitation Center, and Sandy Regional, Inc. dba Sandy Regional Convalescent & Rehabilitation Center, the parent companies of each of which are Westcare Management, Inc. and Horizon West, Inc.; (f) Heritage Convalescent Hospital, Inc., the parent companies of which are Auburn Manor and Horizon West, Inc.; (g) Holiday Hills Convalescent Hospital, Inc. ("Holiday Hills") dba Grass Valley Convalescent Hospital, sued erroneously as Sierra Medical Enterprises, Inc. dba Grass Valley Convalescent Hosp., the parent companies of Holiday Hills being Re-Peg Management, Inc. (whose own parent company is Sierra Medical Enterprises, Inc.), Sierra Medical Enterprises, Inc., and Horizon West, Inc.; and (h) Monterey Bay Convalescent Hospital, Inc., which was dissolved in 1994 and whose parent company was Far West, Inc. No publicly held company owns 10% or more of the stock of any of the foregoing corporations.

Respondents, relators-appellants below, are Foundation Aiding the Elderly and Marsha J. Baker.

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Petitioners, Horizon West, Inc. and its subsidiaries, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, *see infra* Appendix to Petition ("Pet. App.") 1a-9a, is reported at 265 F.3d 1011 (9th Cir. 2001). The opinions of the district court, Pet App. 10a-29a & 31a-37a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2001. Pet. App. 2a, 43a. A timely petition for rehearing was denied on December 21, 2001. Pet. App. 40a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This petition presents an important question concerning the proper interpretation of Congress's jurisdictional grant to the federal courts to hear so-called *qui tam* claims. *Qui tam* actions are authorized by the False Claims Act, 31 U.S.C. §§ 3729-3733. Essentially, this Act permits a private individual (frequently termed a "relator") to bring suit against an entity that the relator has reason to believe has defrauded the federal government. *See id.* § 3730(b)(1). This action is brought in the name of the United States and must be initially served on the United States, together with "written disclosure of substantially all material evidence and information the [relator] possesses," *id.* § 3730(b)(2), which is frequently termed a "Disclosure Statement." The United States then has the option of intervening in the action; if it elects not to do so, the relator may proceed by itself.

In enacting the False Claims Act, Congress recognized the potential for abuse of *qui tam* actions—for example, the possibility that private individuals would file *qui tam* actions

even where they relied on matters already known to the public. Congress thus limited the scope of *qui tam* actions as follows:

> No court shall have jurisdiction over an action under this section *based upon the public disclosure of allegations or transactions* in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A) (emphasis added). It is this jurisdictional bar on *qui tam* actions that is at issue here.

STATEMENT

In this case, the Ninth Circuit adopted an interpretation of Section 3730(e)(4)(A) that greatly expands the scope of the *qui tam* action by permitting relators to bring such an action even where the essential underlying information concerning a defendant's asserted wrongdoing or impropriety was previously publicly disclosed and where relators themselves have no additional information suggesting that the United States has been defrauded. The Ninth Circuit's approach to Section 3730(e)(4)(A) had previously been invented by the D.C. Circuit and adopted by the Eighth Circuit, but is contrary to the approach taken by the Second, Third, Sixth, and Tenth Circuits. These latter circuits—consistently with the plain language of the statute—dismiss as barred *qui tam* suits brought by relators that rely on publicly disclosed information of a defendant's wrongdoing.

To place the issues in this case in context, it is necessary to set forth (1) the federal regulatory scheme to which petitioners and other nursing homes are subject, insofar as it is relevant here, (2) the particular contentions of the *qui tam* relators in this case, (3) the dismissal of the case in the district court, and (4) the reversal of that decision by the Ninth Circuit.

1. The Regulatory Scheme Governing Skilled Nursing Facilities. Petitioners operate skilled nursing facilities, which provide care to individuals in need of continuing nursing care. Skilled nursing facilities are subject to extensive regulation by the federal and state governments, partly because of their participation in the Medicare and Medicaid programs.

One component of this oversight is regulation by the Health Care Financing Administration ("HCFA"), an agency within the federal government's Department of Health and Human Services. *See generally* 42 U.S.C. § 1395i *et seq.* (Medicare); *id.* § 1396r *et seq.* (Medicaid).[1] HCFA contracts with state agencies to monitor the compliance of skilled nursing facilities with federal regulations. *Id.* § 1395i-3(g)(1)(A). Thus, skilled nursing facilities must undergo a federally mandated certification and inspection, called a "survey," at least once every 15 months. *Id.* § 1395i-3(g)(2)(A)(i), (iii); 42 C.F.R. § 488.308(a). These surveys include unannounced inspections and investigations of complaints. Generally, each survey consists of the surveyors' spending several days in each facility, observing the conditions in the facility and the care given to residents, interviewing staff and residents, and reviewing medical records. *See* 42 C.F.R. § 488.110.

The result of each survey is a detailed written report, called a "HCFA-2567," in which the surveyors document alleged violations of federal regulatory standards and, where applicable, make conclusions in the form of a "statement of deficiencies." 42 C.F.R. § 488.18. The skilled nursing facility that is the subject of a particular survey must implement a "plan of correction" to remedy any regulatory violation that is reflected in the report. *Id.* § 488.402(d). In addition, the report must be made available to the public at

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[1] Although HCFA was recently renamed the Centers for Medicare & Medicaid Services, *see* 66 Fed. Reg. 35437-03 (July 5, 2001), we will use the more familiar name.

the state agency, 42 U.S.C. § 1395i-3(g)(5)(A), and to residents at the skilled nursing facility itself, 42 C.F.R. § 483.10(g)(1); *see also id.* § 488.325(a) (general requirement of public availability).

2. Commencement of This Action. This is a *qui tam* action commenced by a group that bills itself as an advocacy group for nursing home residents and their families. As summarized by the district court, "[t]he gravamen of relators' qui tam claim is that the management and staff at defendants' skilled nursing facilities engaged in widespread and intentional falsification of patient records in order to conceal substandard service delivery, and thereby profit by receiving federal monies without having provided the requisite services." Pet. App. 22a-23a. The United States declined to intervene in the action.

Relators' claims derived from the federally mandated surveys discussed above. For example, the Disclosure Statement that relators were required to file along with their complaint, *see* 31 U.S.C. § 3730(b)(2); *supra* p. 1, does not detail allegations received from relators, but rather quotes at length from publicly available HCFA-2567s and similar materials. In these circumstances, petitioners moved to dismiss for lack of subject-matter jurisdiction, arguing that "[t]he critical elements of the relators' claims of fraud . . . had been made public by the government's own previously publicly disclosed surveys and citations." CA9 Excerpts of Record 134.

3. The District Court's Decision. The district court granted petitioners' motions to dismiss for lack of federal jurisdiction. Pet. App. 28a, 30a. The court concluded that the action was barred by 31 U.S.C. § 3730(e)(4)(A)—that is, that it was "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." In reaching its decision, the district court addressed several components of this statutory bar on jurisdiction.

The court addressed first what it termed the matter of "public disclosure." Pet. App. 16a-24a. It began by concluding that various pre-existing disclosures at issue in this case in fact occurred in an "administrative hearing, . . . [an] administrative, or Government Accounting Office report, hearing, audit, or investigation, or [in] the news media." *Id.* at 17a. These included the state administrative reports prepared pursuant to federal law requiring surveys or inspections of facilities participating in Medicaid and Medicare programs. *See id.* at 21a-22a & n.16.

The district court then turned to the question of whether these previously disclosed materials contained the same "allegations or transactions" as were the subject of relators' *qui tam* action. The court ultimately concluded that the allegations in relators' complaint had been publicly disclosed.[2] It explained that "[r]elators' complaint does no more than draw an inference of fraud from information previously disclosed in public documents." *Id.* at 35a. The court concluded that where "a relator adds no substantive information [but] merely assembles . . . information [already in the public domain] and draws inferences therefrom," the information in the complaint consists of "allegations or transactions" that have already been publicly disclosed. *Id.* at 35a-36a (internal quotation marks omitted).

The court finally discussed whether the relators' allegations were "based upon" the pre-existing disclosures. In making this determination, the court focused on what the relators knew when they filed the complaint. The court observed the following concerning relators' Disclosure Statement:

> While the 154-page Disclosure Statement provides greatly detailed allegations of substandard medical care at defendants' facilities, the Statement reports no

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[2] We say "ultimately" because the district court modified its rationale upon reconsideration, but confirmed its previous order granting defendants' motion to dismiss. Pet. App. 34a-36a.

> specific knowledge or information about falsification of records or fraud on the government. Even in a subsection of the Statement entitled "Examples of Company-Wide Falsifications and Non-Compliance," relators only generally plead that "defendants have maintained, and continue to maintain, a company-wide custom and practice of falsifying the activities of daily living ('ADLs') for the various residents to conceal the lack of care and services required."

Pet. App. 25a. The court proceeded to demonstrate—based on the record created in discovery and on relators' concessions—that "at the time they filed their sealed complaint and Disclosure Statement with the government, [relators] possessed no independent knowledge of any falsification of records or fraudulent practices by the defendants." *Id.*

As for relators' claim that "their assertion of record falsification or company-wide fraud was based upon an *inference* drawn from the state audits and their own direct observations of substandard care," the court rejected this as insufficient to withstand the jurisdictional bar. *Id.* (emphasis added). This was so, the court stated, because (under the decisions of various federal courts of appeals) "[a] relator may not simply speculate about the existence of a fraudulent transaction based upon publicly disclosed material" but must rather provide "substantive information about the particular fraud" in order to go forward. *Id.* at 26a (internal quotation marks omitted).

In short, the court concluded that "[b]ecause relators have not come forward with any independent evidence to dispute that their allegations must have been 'based upon' publicly available documents, the public disclosure provision bars their claims of fraud." *Id.* Accordingly, the district court dismissed the relators' action as barred by Section 3730(e)(4)(A). On relators' motion for reconsideration, the district court adhered to its dismissal of relators' action. Pet. App. 36a; *see supra* p. 5 n.2.

4. The Court of Appeals' Decision. Relators appealed to the Ninth Circuit. In reversing, the Ninth Circuit did not address the primary argument raised by relators: "whether the publicly-disclosed surveys at issue qualify as public disclosures as defined in the statute." Pet. App. 5a. The court concluded that "[w]e need not answer that question today." *Id.* at 6a. "That is so," the court stated, "because, even assuming that the surveys do qualify as public disclosures, the action is still not barred because none of the disclosures in the surveys or any of the other disclosures reveal either the allegations or transactions at issue in this case." *Id.*

The court bifurcated its inquiry as to whether any public disclosure had "reveal[ed] the 'allegations or transactions' underlying Appellants' complaint." *Id.* The court stated that with respect to the first component of this phrase, it was required to address "whether *allegations of fraud* were previously disclosed." *Id.* (emphasis added to "of fraud"). Thus, it characterized its task as "[to] determine whether there was a public disclosure of fraud which was 'substantially similar to those disclosed in the earlier . . . action.'" *Id.* (quoting *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1033 (9th Cir. 1998)). With respect to the other component of the statute—"whether the *transactions* underlying a relator's complaint were publicly disclosed"—the court "adopt[ed] the analysis first laid out by the [D.C. Circuit]: '[I]f X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, *i.e.*, the conclusion that fraud has been committed.'" Pet. App. 6a (quoting *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994)). "[I]n a fraud case," the Ninth Circuit concluded, "X and Y inevitably stand for but two elements: 'a misrepresented state of facts and a true state of facts.'" *Id.* (quoting *Quinn*, 14 F.3d at 655).

In its application of these principles to the facts of this case, the court deployed the essential reasoning of this "X + Y = Z" test both to determining whether there had been prior public disclosure of "allegations" and to determining whether there had been prior public disclosure of "transactions." The court of appeals required, with respect to both, that any prior public disclosure have revealed both "a misrepresented state of facts and a true state of facts," *id.* (internal quotation marks omitted), else it would conclude that the jurisdictional bar was not triggered.

The Ninth Circuit first considered whether there was prior public disclosure of "allegations" which barred relators' *qui tam* action. Pet. App. 7a-8a. It concluded that materials in various state-court lawsuits and a newspaper article to which petitioners pointed did not constitute "allegations" within 31 U.S.C. § 3730(e)(4)(A) because they did not assert all the elements of fraud. "What is conspicuously missing from [these documents]," the court stated, "are any allegations that the named defendants misrepresented the level of care to the government and received payment for that alleged substandard care." Pet. App. 7a. For the court of appeals, it was dispositive that, "at most, th[e] [prior] allegations only disclose the true set of facts" (*id.*) and not also a misrepresented state of facts, as would be required for fraud. Under this reasoning, it was thus of no consequence to the court that these prior disclosures raised assertions of wrongdoing or impropriety against petitioners. The court did not consider the HCFA surveys at all in this part of its opinion.

The court next considered whether "[e]ven if the above *allegations* did not specifically identify the fraud at issue, the action may still be barred if some disclosures revealed the *transactions* underlying the fraud." Pet. App. 8a. Here, the court finally acknowledged the government-conducted surveys, stating that they were "the primary source which could potentially reveal the underlying fraudulent transactions." *Id.* at 9a. Indeed, the court noted that "[t]he Second Amended

Complaint specifically alleges instances of substandard care against 17 defendants" and that "[t]he great majority of these specific allegations *are taken from the surveys*." *Id.* n.6 (emphasis added). The court nonetheless concluded that these materials were not prior disclosures barring relators' action because the surveys disclosed only "the true state of fact" (*viz.*, "that the defendant provided substandard care") and not "a misrepresented state of fact." *Id.*[3] Having concluded that there had not been prior public disclosure of the "allegations or transactions" in relators' complaint, the court of appeals reversed the district court's dismissal of this action and did not find it necessary to discuss whether relators' action was "based upon" such prior public disclosures.

On petitioners' request for rehearing and rehearing en banc, the court of appeals corrected several typographical errors in its opinion but denied rehearing. Pet. App. 38a-40a.

REASONS FOR GRANTING THE PETITION

Congress enacted a statutory bar on federal court jurisdiction over *qui tam* actions that are "based upon the public disclosure of allegations or transactions [in certain fora]." 31 U.S.C. § 3730(e)(4)(A). In interpreting this statute, the Ninth Circuit (like the D.C. Circuit before it in *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 654 (1994)) has required that there be some pre-existing public allegation *of fraud* against a defendant to trigger the bar. This is not the ordinary and common-sense meaning of "allegations." It should rather be enough, for Section 3730(e)(4)(A) to be implicated and a *qui tam* action to be barred thereby, that there were pre-existing public

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[3] Though not precisely specified here by the Ninth Circuit, the allegedly "misrepresented state of fact" asserted by relators could be fairly described as a representation by defendants in seeking Medicare and Medicaid reimbursement "that they provided care in compliance with the federal regulations." CA9 Excerpts of Record 151 (Defendants' Joint Mem. in Support of Motion to Dismiss).

assertions of wrongdoing or impropriety on a defendant's part that are then relied upon in support of the *qui tam* action. This approach is more faithful to the text of the particular disputed language in the statute and to the structure of the statute. It is also more faithful to the purpose of the False Claims Act, which is (at least in part) designed to encourage relators to bring to light *information* that has not previously been made public. *See infra* Part I.

Furthermore, the interpretation of the D.C. Circuit and the Ninth Circuit, though consistent with that of some other circuits, is in conflict with the approach routinely deployed by the Second Circuit and the Third Circuit in *qui tam* suits. These courts have given the word "allegations" in Section 3730(e)(4)(A) its common-sense meaning of assertions of wrongdoing or charges of impropriety. Thus, in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1993), it was enough to bar jurisdiction that the *qui tam* relator based his action in part upon discovery material from a previous lawsuit against the same defendant, even though there was no indication that the previous lawsuit (a wrongful-death action) involved any allegation *of fraud*. It was enough, in other words, that plaintiff relied upon publicly available *information adverse to the defendant*. The Third Circuit's decision in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991), is to the same effect. These decisions are routinely relied upon within their respective circuits by district courts in dismissing *qui tam* actions. The bottom line thus is that cases such as the instant one go forward in some circuits (those following the *Quinn* approach) and are dismissed in others. Whichever view is correct, only this Court, by granting review to resolve the conflict, can provide the uniformity throughout the Nation that is particularly appropriate for threshold questions of jurisdiction. *See infra* Part II.

Finally, review is especially appropriate because, in cases such as this, the *Quinn* test fails to achieve its own stated purposes. *Quinn* recognized that Section 3730(e)(4)(A)'s jurisdictional bar was designed to ensure that a relator "'possess[es] substantive information about the particular fraud, rather than merely background information which enables a putative relator to understand the significance of a publicly disclosed transaction or allegation.'" 14 F.3d at 655 (quoting *Stinson*, 944 F.2d at 1160). In this and analogous cases, however, relators brought no substantive information to the attention of the government, but merely have deployed their knowledge of nursing care facilities and the federal regulatory scheme for reimbursing those facilities for Medicaid and Medicare expenses, in combination with publicly disclosed information in the HCFA audits or surveys, to maintain an opportunistic action. A test such as *Quinn* that fails in numerous cases to achieve its stated purpose should not be unthinkingly applied in each case, as is now occurring in several circuits. *See infra* Part III.

I. THE NINTH CIRCUIT AND THE D.C. CIRCUIT HAVE MISINTERPRETED AND IMPROPERLY LOWERED THE JURISDICTIONAL BAR IN THE FALSE CLAIMS ACT BY REQUIRING PRIOR PUBLIC DISCLOSURES TO INCLUDE SPECIFIC ALLEGATIONS OF FRAUD.

The Ninth Circuit observed that it was adopting the D.C. Circuit's reasoning in *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). Specifically, the court here stated that, to determine whether the jurisdictional bar applied, it had to inquire whether the public disclosures revealed both "'a misrepresented state of facts and a true state of facts,'" which are the two elements of fraud. Pet. App. 6a (quoting *Quinn*, 14 F.3d at 655). Only if documents disclosed publicly prior to the litigation contained both

of these matters, this reasoning goes, can it be said that the documents contained the same "allegations or transactions" as the relators' complaint.

The Ninth Circuit correctly represented the D.C. Circuit's reasoning in *Quinn*. There the court stated that there is "a distinction between 'allegations or transactions' and ordinary 'information' as a matter of common usage and sound interpretation of the [False Claims Act]." 14 F.3d at 653. Only where the former have been disclosed are *qui tam* suits barred. Moreover, the court reasoned, only when *all* the "essential elements" of fraud have been disclosed can it be said that there has been an "allegatio[n]" of fraud. *Id.* at 654. Under this reasoning, the Ninth Circuit was correct to reverse the district court's dismissal, so long as one agrees that the only material in the public disclosures was the provision of substandard care (the "true state of facts," in the D.C. Circuit's terminology) and nothing else (including the "misrepresented state of facts").

But the D.C. Circuit's interpretation of Section 3730(e)(4)(A) in *Quinn* is not correct. The statute nowhere provides that *qui tam* actions are barred only if the specific allegations of fraud have been raised elsewhere. It rather states that they are barred if they are "based upon the public disclosure of allegations or transactions" elsewhere. 31 U.S.C. § 3730(e)(4)(A). Even if the focus is maintained on the word "allegations" for the moment, it is wrong to conclude this word should be interpreted to mean specific allegations *of fraud*, including *all* the essential legal elements of that cause of action.

The word "allegation" means "something asserted or declared." *Webster's Third New International Dictionary* 55 (1971). The term is *not*—either in common or legal parlance—limited to statements of *all elements* of causes of action (e.g., fraud). Thus, particular underlying facts—that do not themselves constitute the entirety of a cause of

action—frequently are said to be "alleged." *See, e.g., Correctional Servs. Corp. v. Malesko*, 122 S. Ct. 515, 518 (2001) ("Respondent alleges that on March 28, 1994, however, Jorge Urena, an employee of petitioner, forbade him to use the elevator to reach his fifth-floor bedroom."); *Southern Ry. v. King*, 217 U.S. 524, 538 (1910) (Holmes, J., dissenting) (recounting "pure allegations of fact" that had been made in the case); *see also* Fed. R. Civ. P., App., Form 2 (giving examples of "[a]llegation of [j]urisdiction"); *id.*, Form 26 (giving example of "[a]llegation of [r]eason for [o]mitting [p]arty" pursuant to Rule 19(c)).

If the word "allegations" is so interpreted in Section 3730(e)(4)(A) of the False Claims Act—that is, if it is interpreted to encompass assertions of fact as well, at least where they reflect adversely on the entity against which they are made—then the D.C. Circuit's (and by extension the Ninth Circuit's) interpretation of Section 3730(e)(4)(A)'s jurisdictional bar is incorrect. Under this approach, the surveys to which petitioners point as constituting the "public disclosures" in fact contain some of the same "allegations" as relators' complaint, for the surveys (even by the Ninth Circuit's description) contain numerous instances of substandard care. Indeed, that this is the superior interpretation of the term "allegations or transactions" in the statute would seem to be established by the Ninth Circuit's own statements that "[t]he Second Amended Complaint specifically *alleges* instances of substandard care against 17 defendants" and that "the great majority of these specific *allegations* are taken from the surveys." Pet. App. 9a n.6 (emphasis added). Thus, while the Ninth Circuit asserts that prior public disclosures do not contain "allegations" within the meaning of the False Claims Act unless they actually contain *all* elements of fraud, this assertion is contradicted by the fact that the court otherwise demonstrates (through the material quoted in the

foregoing sentence) that the word "allegations" properly possesses a different and broader meaning that includes simply assertions of wrongdoing or impropriety.

This conclusion is strengthened when the remainder of Section 3730(e)(4)(A) is considered. First, the jurisdictional bar applies to actions "*based upon* the public disclosure of allegations or transactions" in certain other fora. 31 U.S.C. § 3730(e)(4)(A) (emphasis added). Congress did not state that an action had to be the same as, or be identical to, or be comprised of, or mirror the allegations made elsewhere; it rather is enough that the action is "based upon" those allegations. *Compare* 17 U.S.C. § 106(2) (copyright owner has right "to prepare derivative works based upon the copyrighted work").

Second, this jurisdictional bar uses the term "information" in specific reference to "allegations or transactions," thus suggesting that Congress did not intend to require that the "allegations" be "allegations *of fraud*," as the court of appeals held here. Specifically, the jurisdictional bar provides that "[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in [certain fora], unless the action is brought by the Attorney General or the person bringing the action is an original source of *the information*." *Id.* (emphasis added). Given the incontestable fact that the term "the information" is a reference back to "allegations or transactions," this reference makes clear that the statutory term "allegations" describes the underlying factual allegations, *not* the legal elements of a cause of action. Thus, the structure of the statute—in addition to the plain language as demonstrated above—suggests that Congress did not intend to bar actions only where there is some previous allegation *of fraud*, as the Ninth Circuit here concluded. It rather should be enough, as Congress saw it, that there is prior public disclosure of adverse information upon which the *qui tam* claims are "based."

Although it is not dispositive, a statement by this Court supports this interpretation. In *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), the Court considered whether Section 3730(e)(4)(A)—the very provision at issue here—applied to conduct before its enactment in 1986. In introducing the retroactivity question that was at the center of that case, this Court described Section 3730(e)(4)(A) as barring jurisdiction over a *qui tam* suit "where the suit was based on *information* that had been publicly disclosed." *Hughes Aircraft Co.*, 520 U.S. at 946 (citing 31 U.S.C. § 3730(e)(4)(A)) (emphasis added). This dictum is offered not to suggest that this Court has resolved the issue, but to demonstrate further that the common-sense reading of the jurisdictional bar does not limit its scope to situations where there is a pre-existing, identical allegation *of fraud*.[4]

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[4] It also merits mention that the United States has endorsed an interpretation of Section 3730(e)(4)(A) under which "allegations or transactions" may bar jurisdiction even where the allegations are not *of fraud* but rather "merely" consist of important information that is adverse to a defendant. Specifically, the government has argued in at least one court of appeals that Section 3730(e)(4)(A) precludes jurisdiction over a *qui tam* action brought by a former government employee based upon information obtained in the course of the former government employment. The United States' essential theory has been that "when the government employee uses official information as a private citizen, he has disclosed the information to himself so that a 'public disclosure [of allegations or transactions]' occurs." *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499 (11th Cir. 1991). Although the Eleventh Circuit rejected the United States' argument, it did so primarily because Section 3730(e)(4)(A) "bars actions based upon information that is publicly disclosed *only in certain enumerated instances*" (*i.e.*, "in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media"), none of which was present in the situation of a government employee's disclosing something to himself. *Id.* (emphasis added). The salient point is that, as far as the *Williams* case reveals, the government's contention was not that the former-government-employee relator there had lifted allegations *of fraud* from material prepared while

The conclusion is strengthened still further when one considers the fundamental proposition that, as a jurisdictional provision, Section 3730(e)(4)(A) is "to be strictly construed, and doubts resolved against federal jurisdiction." *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548, 552 (10th Cir. 1992) (relying on this proposition in interpreting another aspect of § 3730(e)(4)(A)); *compare Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (noting that "[i]t is to be presumed that a cause lies outside [the federal courts'] limited jurisdiction") (and cases cited). Thus, where petitioners require no narrow construction, but only a construction of Section 3730(e)(4)(A) based on the ordinary meaning of its words, to demonstrate the absence of a congressional grant of jurisdiction (indeed, the presence of a congressional *bar* on jurisdiction), the impropriety of the Ninth Circuit's approach is clear.

Finally, petitioners appreciate that the term "allegations or transactions" in Section 3730(e)(4)(A) must be read in context and that Congress presumably did not mean to use the term synonymously with the word "information." Thus, it is true that "[c]ourts sometimes speak loosely of barring a *qui tam* suit because it is based on 'publicly disclosed information,' [but] the Act bars suits based on publicly disclosed 'allegations or transactions,' not information." *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992). Petitioners, however, place no reliance on any instances of "loos[e]" language by courts of appeals (either here or in Part II where petitioners demonstrate that the D.C./Ninth Circuit interpretation rebutted here is also in conflict with the approach of certain other courts)—although petitioners do pause to suggest that the fact that so many

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he was an employee, but rather that he had used "official information outside the scope of his employment" (*id.*) and thus made a public disclosure (to himself) of "allegations or transactions" within the meaning of 31 U.S.C. § 3730(e)(4)(A).

courts so characterize Section 3730(e)(4)(A) serves to demonstrate that, under the natural reading of the provision, allegations *of fraud* are not required and that assertions of adverse information or impropriety short of fraud are sufficient to trigger the bar.[5] Rather, petitioners place reliance on the plain language of the statute, which does not require allegations *of fraud* (including all of its essential elements) to trigger Section 3730(e)(4)(A)'s jurisdictional bar, and on its structure, which also militates against the court of appeals' interpretation here. When given its plain meaning and read in context, the jurisdictional bar is implicated where a relator uses a prior public assertion of wrongdoing or impropriety against a defendant as part of the basis for a *qui tam* suit. There were such "allegations" in this case (in the surveys conducted as part of the Medicaid and Medicare programs), and Section 3730(e)(4)(A), properly interpreted, should have been held to preclude jurisdiction in the district court over relators' action.

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[5] *See, e.g., United States ex rel. Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 582 (4th Cir. 2000) (Section 3730(e)(4)(A) bars jurisdiction over "qui tam complaint [if it] was 1) 'based upon' information 2) that was 'publicly disclosed' and 3) [relators] were not the 'original source' of this information"); *United States ex rel. Taxpayers Against Fraud v. GE Co.*, 41 F.3d 1032, 1035 (6th Cir. 1994) ("the relator must be a true 'whistleblower'; therefore, he is precluded from collecting a bounty if the case is brought on the basis of information that has already been publicly disclosed, [31 U.S.C.] § 3730(e)(4)"); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990) ("if the information on which a *qui tam* suit is based is in the public domain, and the *qui tam* plaintiff was not a source of that information, then the suit is barred"); *Houck on behalf of United States v. Folding Carton Admin. Comm.*, 881 F.2d 494, 504 (7th Cir. 1989) (jurisdiction barred because "the information upon which Houck based his complaint was publicly disclosed").

II. THE APPROACH OF THE NINTH CIRCUIT AND THE D.C. CIRCUIT IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS (MOST NOTABLY THE SECOND AND THIRD, BUT ALSO THE SIXTH AND TENTH), WHICH DO NOT REQUIRE AN ALLEGATION OF FRAUD TO TRIGGER THE JURISDICTIONAL BAR.

Petitioners submit that, given the importance of the False Claims Act, the misinterpretation of the Act's jurisdictional bar by two federal courts of appeals is an adequate basis for this Court's exercise of certiorari.[6] But this petition does not merely present a question of statutory (mis)interpretation. It also presents a case where certain other federal courts of appeals have interpreted the statute along the lines of petitioners' foregoing argument and thus are in conflict with the D.C. Circuit and the Ninth Circuit.

Simply put, the dismissal of relators' *qui tam* action would have been affirmed in certain other federal courts of appeals. Particularly where one of the most fundamental components of a congressional act—the extent to which it grants jurisdiction to the federal courts—is interpreted inconsistently across the Nation, it is appropriate for this Court to resolve the dispute.

The decision of the Second Circuit in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1993), is a particularly instructive counter-

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[6] The focus here has been on the D.C. Circuit and the Ninth Circuit, the former because it first expounded the "X + Y = Z" test (or, put alternatively, the requirement that "allegations" in Section 3730(e)(4)(A) be allegations *of fraud*) and the latter because it followed that test here and entered the judgment below. The Eighth Circuit has also adopted and applied this erroneous approach from *Quinn*. *See United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1512 (8th Cir. 1994). As developed in this Part, courts in the Second and Third Circuits routinely, and in the Sixth and Tenth Circuits in some cases, have conflicted with this approach of the D.C., Eighth, and Ninth Circuits.

example. Demonstrating the point requires describing this decision in some detail, but it will become clear that the Second Circuit's interpretation of Section 3730(e)(4)(A) is inconsistent with that of the D.C. and Ninth Circuits. *Cf. Hindo v. University of Health Sciences*, 65 F.3d 608, 610 (7th Cir. 1995) (observing that "[a]s with most False Claims Act cases, this case is heavily dependent on its facts, which we will now undertake to recite in unfortunate detail").

Relator in *Kreindler* was an attorney who had previously represented Audrey Bryant, a widow of a United States Army officer, in a wrongful-death action brought against United Technologies Corp. ("UTC") as a result of a crash involving a Black Hawk helicopter manufactured by UTC. After the *Bryant* wrongful-death action resulted in a settlement, Kreindler filed a *qui tam* action against UTC, "contending that UTC knowingly violated its government contract and presented false or fraudulent claims for payment [for] over 700 Black Hawk helicopters delivered to the United States Army without blade fold pins, a contractually required and critical safety and performance feature." *Kreindler*, 985 F.2d at 1152. Kreindler based his *qui tam* action upon information that UTC had produced in discovery in the *Bryant* wrongful-death action.

The Second Circuit affirmed the district court's dismissal "because Kreindler's *qui tam* action is 'based upon the public disclosure of allegations or transactions' in the *Bryant* action within the meaning of § 3730(e)(4)(A)." 985 F.2d at 1159. The court agreed with UTC that it was enough to bar jurisdiction "that discovery material containing all of the *information* upon which Kreindler's claim is based was filed with the district court in the *Bryant* litigation" and that "the *information* was available to anyone who wished to consult the court file." *Id.* at 1157-58 (emphasis added). It is essential to appreciate that this information whose prior disclosure barred Kreindler's *qui tam* action was *not* some particular allegation of fraud, as would have been required under the D.C. Circuit's

opinion in *Quinn* and the Ninth Circuit's decision in the instant case, but rather was information concerning UTC's course of conduct in delivering Black Hawk helicopters to the United States government.

The case at bar is materially indistinguishable from the *qui tam* action held in *Kreindler* to be precluded by Section 3730(e)(4)(A). To be sure, the particular facts differ, as do the facts of almost any two *qui tam* cases, but the essential context is identical: in both instances, there was prior public disclosure, not of allegations of fraud, but of information that reflected adversely upon a particular entity—in this case, the HCFA surveys with respect to petitioners and in *Kreindler* the documents concerning UTC's conduct with respect to the Black Hawk helicopter. Nonetheless, the dispositions of the two cases are diametrically opposed to one another, with the Ninth Circuit here permitting relators' *qui tam* action to proceed and the Second Circuit there prohibiting relator's *qui tam* action from going forward. This is because, unlike the D.C. and Ninth Circuits, the Second Circuit has not read the phrase "allegations" in Section 3730(e)(4)(A) necessarily to mean "allegations of fraud," but rather has given the phrase its common-sense meaning of assertions of wrongdoing or charges of impropriety.

Despite its variance from the D.C. Circuit and the Ninth Circuit, the Second Circuit is not alone in its interpretation of the jurisdictional bar. The Third Circuit followed the same basic approach in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991). The *qui tam* action in *Stinson* asserted that Prudential had defrauded the federal government by avoiding its statutory responsibility to pay certain insurance claims as the primary insurer. The court of appeals affirmed the district court's dismissal of this action against Prudential under Section 3730(e)(4)(A) because it was based upon material that had been disclosed during discovery in a previous lawsuit. Notably, this previous lawsuit did not involve an

allegation of fraud against Prudential—indeed, it was a lawsuit brought by *another* insurance company (Provident) against one of its insureds, in which Provident sought a declaratory ruling that its particular claims procedure was lawful. Discovery materials produced in this prior lawsuit included the hand-written results of a telephone survey undertaken by Provident concerning the claims-processing practices of other insurance companies. In these results, a Provident employee had noted this of Prudential's response to the telephone survey concerning its claims procedure: "Left message—Same as us." *Stinson*, 944 F.2d at 1151. When Stinson (the law firm representing the defendant insured in Provident's action) subsequently brought a *qui tam* action against Prudential based upon this information, it was enough to satisfy Section 3730(e)(4)(A) ("based upon the public disclosure of allegations or transactions") that "Stinson acquired the *information* upon which it based its *qui tam* complaint through the material produced by Provident in discovery." *Stinson*, 944 F.2d at 1160 (emphasis added).

Thus, in *Stinson*, the court of appeals imposed no requirement remotely comparable to the D.C. Circuit's approach in *Quinn* and the Ninth Circuit's here. Rather, like the Second Circuit in *Kreindler*, the Third Circuit in *Stinson* concluded that Section 3730(e)(4)(A)'s jurisdictional bar was triggered where previously disclosed information reflecting adversely on a defendant formed part of the basis for the *qui tam* action.

The conflict is plain from the foregoing straightforward readings of the Second and Third Circuits' decisions. Indeed, the broader reading by these courts of Section 3730(e)(4)(A)'s jurisdictional bar has been noted elsewhere. In *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509 (8th Cir. 1994), the Eighth Circuit reversed the district court's dismissal of relators' *qui tam* action because, following the D.C. Circuit's view in *Quinn*, it concluded that "the preclusive effect of section 3730(e)(4)(A) [applies] only when

'the critical elements of a fraudulent transaction themselves [are] in the public domain,'" and in the case before the court only information and not an allegation of fraud had been publicly disclosed. 40 F.3d at 1512 (quoting *Quinn*, 14 F.3d at 654); *see id.* at 1511-14. Judge Magill dissented from this decision by the Eighth Circuit. Although the focus of his dissent concerned the interpretation of the words "based upon" in the jurisdictional bar (as in "based upon the public disclosure of allegations or transactions"), Judge Magill noted without contradiction that, if the approach of several other courts were followed, the court would have to conclude that "allegations or transactions" within the meaning of Section 3730(e)(4)(A) had been disclosed in this case. In making this point, which the majority in *Rabushka* did not dispute, the dissent correctly characterized the Second Circuit as holding in *Kreindler* that "discovery materials indicating that [an] engineering change was made to [the] Black Hawk helicopter (*i.e.*, the false state of affairs) constituted public disclosure of allegations or transactions," 40 F.3d at 1525 n.13 (Magill, J., dissenting) (citing *Kreindler*, 985 F.2d at 1157-58), and the Third Circuit as holding in *Stinson* that "disclosure of [a] single memorandum describing allegedly fraudulent billing practice (but not its false or fraudulent nature) obtained through discovery in unrelated litigation constituted public disclosure of allegations or transactions," *id.* (Magill, J., dissenting) (citing *Stinson*, 944 F.2d at 1157).

Finally, it should be noted that the decisions in *Kreindler* and *Stinson* are not outliers in their own circuits. In fact, these decisions have been routinely invoked to justify the dismissal of *qui tam* actions because central information upon which the actions are based has been publicly disclosed prior to the action; this is true in both the Second[7] and the

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[7] *See, e.g.*, *United States ex rel. Phipps v. Comprehensive Cmty. Dev. Corp.*, 152 F. Supp. 2d 443, 453 (S.D.N.Y. 2001) (citing *Kreindler* for the proposition that "[t]he jurisdictional bar [of Section 3730(e)(4)(A)]

Third[8] Circuits. It is thus of no moment that these circuits have not explicitly stated that their approach differs from the

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applies if the qui tam action is based in any part on public information obtained through independent investigation" and on that basis dismissing action that was based on information disclosed during investigation); *United States ex rel. Pentagen Techs. Int'l Ltd. v. CACI Int'l Inc.*, 1997 U.S. Dist. LEXIS 12244 (S.D.N.Y. 1997) (dismissing relators' *qui tam* claims because, though not identical to allegations in previous lawsuit, they "could not have been constructed without the use of" information discovered in that previous suit); *United States ex rel. Gold v. Morrison-Knudsen Co.*, 870 F. Supp. 457, 459-60 (N.D.N.Y. 1994) (relying on *Kreindler* and dismissing Gold's *qui tam* action because it was based upon publicly disclosed information), *aff'd*, 68 F.3d 1475, 1477 (2d Cir. 1995) (noting that "Gold gleaned the information underlying Counts Two and Three from the media, from administrative reports prepared for the Army Corps, and from arbitration hearings concerning the cost overruns" and observing that "[t]he FCA bars *qui tam* suits based upon publicly disclosed information"); *see also United States ex rel. DeCarlo v. Kiewit/AFC Enters.*, 937 F. Supp. 1039, 1048 (S.D.N.Y. 1996) ("Since the Court finds that there is substantial overlap between the information forming the basis of the present *qui tam* action and the information obtained during the course of the *Mass Electric* litigation, the Court finds the basis of the suit to have been publicly disclosed within the meaning of section 3730(e)(4)(A).").

[8] *See, e.g., United States ex rel. Haskins v. Omega Inst.*, 11 F. Supp. 2d 555, 568 (D.N.J. 1998) (finding certain aspects of *qui tam* claims to be precluded by Section 3730(e)(4)(A) where "the evidence at bar tends to show that plaintiffs based their Complaint substantially on publicly available information" and, again, "because plaintiffs did not know—indeed, could not have known—essential elements of their FCA claim absent administrative reports" and thus "had to rely on publicly disclosed information in order to file their initial Complaint"); *United States ex rel. Atkin v. EEOC*, 1993 U.S. Dist. LEXIS 21268, at *17-19, *21 (D.N.J. 1993) (noting that in *Stinson* "the Third Circuit indicated that there is 'public disclosure' where *the information upon which the qui tam action is based* is potentially accessible to the public" and, on that basis, dismissing *qui tam* action, in part because allegations in complaint derived from information in a previous investigative report that had been publicly disclosed) (emphasis added). On the other hand, the Third Circuit in *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734 (3d

D.C. Circuit's in *Quinn*. This is not only to be expected, given that both the Second Circuit's *Kreindler* and the Third Circuit's *Stinson* were decided *before* the decision in *Quinn*. It also is irrelevant to the fundamental point: the federal courts of appeals take conflicting approaches to the nature of the information that they require to be in the public domain before they will conclude that a *qui tam* action based upon that information is based upon "allegations or transactions" within the meaning of Section 3730(e)(4)(A)'s jurisdictional bar—and therefore these courts reach conflicting results.[9]

Cir. 1997), emphasized that "the Act bars suits based on publicly disclosed 'allegations or transactions,' not information" and on that basis reversed dismissal of a *qui tam* suit where there had been no public allegation *of fraud*. *Id.* at 740-41. Petitioners here do not disagree with the quoted portion of the *Dunleavy* case—so long as it is agreed (as it is not) that the allegations necessary to trigger the jurisdictional bar need not be allegations *of fraud*, but rather can be assertions of wrongdoing or impropriety that do not comprise all of the elements of fraud. *Cf. supra* Part I. In any event, the salient point at the moment is that the *Dunleavy* case indicates that there are two competing lines of authority in the Third Circuit, one invoked by some district courts to justify dismissal and the other by other district courts to justify refusals to dismiss. Just as there is no basis for varying treatment in district courts in different circuits across the Nation, so, too, *a fortiori*, is there no principled basis for inconsistent treatment of *qui tam* claims within the same circuit.

[9] Although the conflict is most stark with respect to the Second and Third Circuits, that is not its extent. The Tenth Circuit also took a different approach from the D.C. Circuit in *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568 (10th Cir. 1995). Fine brought a *qui tam* action against Sandia, which operates one of nine multi-program national laboratories owned by the United States and operated by private or university contractors under the Department of Energy's ("DOE's") administrative oversight, for misappropriating nuclear waste funds in violation of federal law. *See id.* at 569. A General Accounting Office report and a congressional hearing discussed this general practice by the national laboratories but did not mention Sandia specifically. *See id.* at 569-70. The court held that the jurisdictional bar was triggered, reasoning as follows: "Because these disclosures detailed the mechanics of the

At the end of the day, there is a deep, intractable, and important conflict in the courts of appeals. Its effect is that *qui tam* actions such as the instant one, which are based upon information that has previously been disclosed to the public, go forward in some parts of the Nation, even while they would be barred in other parts. Whichever approach is correct (and thus regardless of petitioners' view set forth in Part I above that it is not the Ninth Circuit's), the disparity in treatment has no principled basis. The need for review of the question presented here is thus clear, as will often be the case whenever the existence of federal jurisdiction over a large class of cases is in doubt.

III. THE APPROACH OF THE D.C. CIRCUIT IN *QUINN* AND THE NINTH CIRCUIT HERE FAILS TO GIVE EFFECT TO WHAT EVEN THESE COURTS CONCEDE IS CONGRESS'S INTENT IN SECTION 3730(e)(4)(A) TO PRECLUDE *QUI TAM* ACTIONS WHERE RELATORS ADD NO SUBSTANTIVE INFORMATION OF WRONGDOING.

The foregoing sections establish (i) that the D.C. Circuit in *Quinn* (along with the Ninth Circuit here and the Eighth Circuit) has given Congress's jurisdictional bar in Section

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practice, revealed that at least two of Sandia's eight sister laboratories were engaged in it, and indicated the DOE's acquiescence, we conclude that they sufficiently alerted the government to the likelihood that Sandia would also 'tax' nuclear waste funds in the future." *Id.* at 571. "In other words," as the Ninth Circuit would subsequently characterize the Tenth Circuit's reasoning, "the prior public disclosures contained enough information to enable the government to pursue an investigation against Sandia," and that was sufficient to trigger Section 3730(e)(4)(A)'s jurisdictional bar. *United States v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1019 (9th Cir. 1999). *See also infra* pp. 27-29 (demonstrating through discussion of *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326 (6th Cir. 1998), that, though having formally endorsed the *Quinn* "X + Y = Z" test, the Sixth Circuit, too, has conflicted with it).

3730(e)(4)(A) an interpretation that has heightened its requirements (and thus lowered the threshold for jurisdiction), contrary to the ordinary and common-sense meaning of its key term "allegations," and (ii) that in so doing, these courts have deviated from the interpretation of Section 3730(e)(4)(A) established by the Second and Third Circuits (as well as the Sixth and the Tenth), with the result that cases (such as the instant one) that would be barred in any of this latter group of circuits are permitted in any of the former. More than this is scarcely required to justify this Court's review, especially given that the disputed question concerns an interpretation of a jurisdictional statute (or, indeed, an anti-jurisdictional statute). But in fact there is more. In cases such as this, the *Quinn* approach fails under even its own terms: it permits a *qui tam* action where a relator adds no substantive information of wrongdoing.

As *Quinn* at least nominally appreciated, Congress sought in the False Claims Act "to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior." 14 F.3d at 651. The D.C. Circuit in *Quinn* thus stated, quoting *Stinson*, that Section 3730(e)(4)(A) was intended to ensure that a *qui tam* relator "'possess[ed] substantive information about the particular fraud, rather than merely background information which enables a putative relator to understand the significance of a publicly disclosed transaction or allegation.'" *Id.* at 655 (quoting *Stinson*, 944 F.2d at 1160). This proposition is recognized, at least in the abstract, by all federal courts, under a variety of different formulations: for example, the D.C. Circuit itself has stated that under Section 3730(e)(4)(A) "[a] relator's ability to recognize the legal consequences of a publicly disclosed fraudulent transaction does not alter the fact that the material elements of the violation already have been publicly disclosed." *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 688 (D.C. Cir. 1997).

Cases such as this, however, are examples of such opportunistic behavior that is nonetheless permitted under the rule of decision in *Quinn*. Relators have added no "substantive information about [some] particular fraud" on the part of petitioners. *Compare Quinn*, 14 F.3d at 655 (quoting *Stinson*, 944 F.2d at 1160). Relators have brought to the table, at most, "background information which enables [them]," *compare id.* (quoting same), given their knowledge of federal Medicaid/Medicare reimbursement schemes, to take publicly disclosed information—the HCFA audits or surveys that are required by federal law to be available at state offices and indeed to be posted at care facilities—and to allege (assuming that petitioners have submitted reimbursement requests for some of the same care deemed by the HCFA audits or surveys to be substandard) that petitioners in making their reimbursement requests have sought to defraud the federal government. Relators have thus sought to take information in the public domain (information adverse to petitioners) that was as available to others as it was to them and, on the basis of that information and their background knowledge, to allege fraud. *As measured by* Quinn*'s own recounting of Congress's purposes in Section 3730(e)(4)(A)*, the *qui tam* statute was not intended to permit this type of action. Yet the simplistic "X + Y = Z" rule of decision that the Ninth Circuit here adopted from *Quinn* permits this action. Petitioners submit that something is wrong with constant application of a test that not only departs from the language of the statute (by requiring that the "allegations" be "allegations *of fraud*"), *see supra* Part I, but also permits actions that the rationale said to underlie the test indicates should be barred, as established in this Part.

This is not merely petitioners' intuition. Surely it is telling that in one case where the policies underlying the *qui tam* statute would not have been served by permitting a *qui tam* action to go forward, but the "X + Y = Z" test would have so permitted, a court of appeals that indicated that it would otherwise follow this approach from *Quinn* simply refused to

apply it. In *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326 (6th Cir. 1998), relator argued that a previous administrative complaint that she had filed was not a prior public disclosure of the "allegations or transactions" in the *qui tam* suit because only the "Y" and not the "X" had been asserted there—i.e., she contended that the previous complaint "disclosed only the true state of facts and not the misrepresented state of facts." *Id.* at 331. The court of appeals (a) generally endorsed the *Quinn* "X + Y = Z" formulation, (b) did not disagree with relator's assertion that her previous disclosure had not alleged both X and Y, and (c) further was not persuaded by the *qui tam* defendant's response that the previous disclosure had alleged Z (i.e., had made an outright allegation of fraud). *See id.* at 331-32. Yet the court nonetheless held the relator's action barred by Section 3730(e)(4)(A). The Sixth Circuit explained that "although [relator's previous administrative] complaint may not have constituted an explicit, formal allegation of either fraud [i.e., Z] or the essential elements of fraud [i.e., X + Y], *it certainly presented enough facts to create an inference of wrongdoing on the part of [the* qui tam *defendant]*." *Id.* at 332 (emphasis added). The Sixth Circuit explained that "this case is [thus] distinguishable from the ones [relator] relies on in which the disclosed information did not suggest an inference of wrongdoing or bad faith," such as *Quinn*, where the court held that "disclosure of facially valid pay vouchers would not defeat jurisdiction where the records did not suggest any misrepresentation on the defendant's part in submitting them," *id.* (citing 14 F.3d at 656), and *Dunleavy*, where, again, the disclosed fact was on its face innocuous, *id.* (citing 123 F.3d at 742). *Compare United States v. A.D. Roe Co.*, 186 F.3d 717, 724 (6th Cir. 1999) (following *Quinn* and stating that "X + Y = Z" test must be satisfied to trigger Section 3730(e)(4)(A)'s jurisdictional bar).

As demonstrated above in Part I, petitioners here want nothing more than what the *qui tam* defendants received from

the Sixth Circuit in *Jones*—an interpretation of Section 3730(e)(4)(A) that is sensitive and faithful to the provision's purpose of barring *qui tam* actions where a relator brings no "'substantive information about the particular fraud, [but] merely background information which enables [the] relator to understand the significance of a publicly disclosed transaction or allegation.'" *Quinn*, 14 F.3d at 655 (quoting *Stinson*, 944 F.2d at 1160). That is what *Quinn* sought to provide, but mechanical application of its "X + Y = Z" formulation by courts such as the Ninth Circuit has been insensitive and unfaithful to this purpose, causing cases such as this to go forward, even though they are based upon public allegations of wrongdoing or impropriety on a defendant's part.[10] Other courts, such as the Third Circuit, *see supra* pp. 20-21, 23-24 n.8 (discussing *Stinson* and *Dunleavy*), and the Sixth Circuit, *see supra* pp. 27-28 (discussing *Jones* and *A.D. Roe Co.*), have attempted to be more sensitive and faithful to this purpose, but in doing so have both departed from courts such as the D.C. Circuit and the Ninth Circuit and prompted unacknowledged intracircuit conflicts.

In short, it is true that *Quinn* avoided an overly broad jurisdictional bar—i.e., an interpretation of Section 3730(e)(4)(A) that would bar jurisdiction wherever *any*

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[10] It may be that the D.C. Circuit's "X + Y = Z" formulation is best conceived of as analogous to this Court's statement with respect to federal-question jurisdiction that "[a] suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.). Of this it has been famously remarked that "[i]t has come to be realized that Mr. Justice Holmes' formula is more useful for inclusion than for the exclusion for which it was intended." *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964) (Friendly, J.). The analogy is that a case where the "X + Y = Z" formulation is satisfied (i.e., where there is either both X and Y or Z) clearly is included within the jurisdictional bar; that does not establish, however, that no other cases come within Section 3730(e)(4)(A), and the Ninth Circuit was thus wrong to apply the formula as a rule of exclusion.

information, however innocuous, related to the fraud had been disclosed. But in avoiding this rock, the case—at least as it has been interpreted and employed by courts such as the Ninth Circuit here—has opened up a whirlpool of excessive federal jurisdiction, beyond Congress's intent. Only this Court can provide a principled interpretation of Section 3730(e)(4)(A) that can be applied consistently both across the Nation and within individual circuits. There is no substantial basis for the disparate treatment afforded different *qui tam* cases with respect to application of Section 3730(e)(4)(A).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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